No. 82-1179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
and NORTHWESTERN UNIVERSITY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STUART BERNSTEIN
SUSAN S. SHER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

THOMAS H. MORSCH
WLLIAM H. THIGPEN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

ARTHUR M. SUSSMAN
The University of Chicago
Chicago, Illinois 60637
Attorneys for Respondents The University of Chicago, et al.

MARTHA P. MANDEL
Northwestern University
Evanston, Illinois 60201
Attorneys for Respondents Northwestern University, et al.

QUESTION PRESENTED

The trial court dismissed petitioner's complaint for failure to state a claim. The Court of Appeals affirmed and denied petitioner's motion for leave to amend in that court or to permit petitioner to present a motion to amend in the trial court. Petition for Writ of Certiorari to review the dismissal was denied. Petitioner then moved to amend in the trial court 19 months after dismissal of the complaint. The motion was denied. Petitioner appealed the denial, and the Court of Appeals dismissed the appeal. Did the trial court err in refusing to permit amendment after the Court of Appeals had denied leave to present a motion to amend?

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Petitioner Geraldine Cannon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the May 13, 1982 order of the Court of Appeals in Case Nos. 82-1107 and 82-1120 dismissing her appeal from an order of the trial court denying her motion to amend her complaint. The Court of Appeals had previously in Case No. 80-1763 upheld dismissal of the complaint for failure to allege purposeful discrimination in an action for violation of Title IX of the Education Amendments of 1972. *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981). The

Court of Appeals had also, in that prior appeal, denied petitioner's motion to amend the complaint to include allegations of purposeful discrimination or to permit the trial court to entertain a motion to so amend. This prior decision of the Court of Appeals was itself the subject of a petition for writ of certiorari which was denied by this Court (No. 81-769). 454 U. S. 1128 (1981).[1]

Respondents The University of Chicago, Northwestern University, and their respective medical school admissions officials respectfully submit that the court below properly dismissed petitioner's appeal. The Court of Appeals simply followed the well-established rule that amendment is not permitted in the trial court after dismissal of a complaint is affirmed on appeal unless leave of the appellate court is obtained. E.g., 3 Moore's Federal Practice § 15.11 at 15-147 (2d ed. 1980). Because the Court of Appeals, in No. 80-1763, had denied petitioner's motion to amend and had denied petitioner leave to present a motion to amend in the trial court, the trial court had no further jurisdiction in the matter. With the denial of the subsequent petition for writ of certiorari by this Court in No. 81-769 this protracted litigation was at an end. Petitioner's motion to amend filed thereafter in the trial court was properly denied, and the Court of Appeals dismissal of the appeal from that denial was correct.

The Court of Appeals' decision raises no important questions of federal law and creates no conflict with any other federal court decision; therefore, the petition should be denied.

STATEMENT OF THE CASE

This is the fourth time this case has been before the Court. A brief review of the prior proceedings is necessary to set the circumstances of the current Petition.

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[1] Petitioner attempts to present this issue again in the current Petition. See Cert. Pet. i, Question 1. As we argue below, this is not properly before the Court at this time.

Separate suits were commenced in the summer of 1975 against The University of Chicago and Northwestern University after each had denied petitioner's application to its respective medical schools.[2] The complaints alleged discrimination on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681, et seq.[3] The two actions were treated together and have been consolidated for purposes of appeal. To simplify this statement, the separate suits and identical disposition will be treated as one in this Brief.

The trial court and Court of Appeals initially dismissed the complaint on the ground that a private right of action did not lie to enforce Title IX, and that only administrative remedies were available. This Court reversed, holding there was a private right of action, and the case was remanded for further proceedings. *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

Upon remand, respondents moved to dismiss for failure to allege that the universities had denied Ms. Cannon's application for admission to their medical schools with the purpose and intent of discriminating against her because of her sex.

The trial court reserved ruling on the motions to dismiss and held a six-day evidentiary hearing on petitioner's petition for a preliminary injunction. The petition was denied after hearing; petitioner appealed the denial, and the Court of

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[2] Ms. Cannon also sought admission to eight other medical schools in 1975 and was not admitted to any of them. (Transcript of Proceedings on Plaintiff's Application for a Preliminary Injunction, September 21, 1979, at 74-75, N.D. Ill., Nos. 75-C-2402, 2724.) In 1979 she filed suit against the five other Illinois medical schools. *Cannon* v. *University of Health Sciences/The Chicago Medical School, et al.*, No. 79 C 5009 (N.D. Ill.). Appeal from dismissal of these complaints is now pending (No. 82-2239, 7th Cir.).

[3] Other claims asserted in the original complaint have been disposed of and are no longer relevant.

Appeals affirmed on April 25, 1980 by unpublished opinion (No. 79-2207). Appeal was preceded by a Petition for Emergency Writ of Mandamus (No. 79-2117) and Application for Extraordinary Writ of Rule Nisi (No. 79-2118), both of which were also denied.

On May 23, 1980, the trial court granted respondents' motion and dismissed the complaint on the ground that it had failed to allege that the universities had purposefully discriminated against petitioner. Petitioner then filed another Petition for Emergency Writ of Mandamus (No. 80-1736), which was denied by the Court of Appeals on May 30, 1980. Petitioner then appealed the order of dismissal of May 23, 1980. The Court of Appeals affirmed, holding that a violation of Title IX required purposeful discrimination. *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981).

On May 20, 1981 after the Court of Appeals decision but before its mandate issued, petitioner filed in the Court of Appeals a Motion to Amend Complaints, requesting "leave to amend the complaints as specified herein or to present motions for such amendments in the district court." The amendment proposed was the conclusory allegation of "purposeful and intentional discrimination against women." This motion was denied by order of May 27, 1981. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 22, 1981. Copies of the orders of the Court of Appeals of May 27 and June 22, 1981 are included in the Appendix to the Petition now before this Court. (Cert. Pet. App. 1b, 1c.)

Petitioner then filed in this Court a Petition for Writ of Mandamus to the Court of Appeals for the Seventh Circuit attacking the dismissal and affirmance (No. 81-45), followed by a Motion to Expedite Consideration of the Petition for the Writ of Mandamus. This Court denied the mandamus petition on October 5, 1981. *In re Cannon*, 454 U. S. 811 (1981).

A Petition for Writ of Certiorari seeking review of the affirmance of the dismissal was then filed and was denied on December 14, 1981. 454 U. S. 1128 (1981).[4]

On December 22, 1981—19 months after the dismissal by the trial court and more than a year after the Court of Appeals had expressly denied leave to amend or to present a motion for leave to amend in the trial court—petitioner moved in the trial court for leave to amend the complaint by adding allegations of purposeful discrimination. The trial court denied the motion. Petitioner than filed another Petition for Writ of Mandamus in the Court of Appeals, which was denied on February 4, 1982 (No. 81-3043). Petitioner next filed a Petition for Rehearing and Suggestion for Rehearing En Banc with respect to the February 4, 1982 order denying the Mandamus Petition. This was denied on March 16, 1982.

Pending disposition of the Petition for Writ of Mandamus, petitioner appealed from the trial court's order of December 22, 1981, denying the motion to amend (Nos. 82-1107, 82-1120).

Inasmuch as the issue raised on the appeal was the identical issue raised, fully briefed, and already decided by the Court of Appeals in consideration of the mandamus petition by orders of February 4 and March 16, 1982, the universities on March 26, 1982 moved to dismiss the appeal. This motion was granted on May 13, 1982. On May 27, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc of the order of May 13, 1982. This Petition was denied on October 6, 1982.[5]

The Petition now before the Court followed.

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[4] In neither the mandamus petition nor certiorari petition did petitioner seek review of the order of the Court of Appeals denying leave to amend or leave to present a motion to amend in the trial court.

[5] The orders of the Court of Appeals of February 4, March 16, May 13, and October 6, 1982 are included in the Appendix to the Petition now before the Court. (Cert. Pet. App. 1d, 1e, 1f, 1g.)

ARGUMENT

1. Introduction

The Court of Appeals has reviewed the issue of petitioner's motion to amend her complaint following affirmance of the trial court's dismissal of the complaint for failure to state a claim on six separate occasions and in six separate orders has upheld the dismissal.[6] These decisions state abundant reasons for the trial court's denial of leave to amend her complaint: (1) petitioner's decision to elect to stand on her complaint after it was dismissed by the trial court; (2) the belatedness of petitioner's attempt to amend in the Court of Appeals more than a year after the trial court's dismissal of the complaint and in the trial court 19 months after dismissal; (3) the trial court's lack of jurisdiction to rule on the merits of petitioner's motion to amend after the Court of Appeals denied leave to present such a motion.

The futility of the proposed amendment is an additional ground. Petitioner has acknowledged that her proposed amendment was merely formal rather than substantive; she has never intended to meet the required showing of purposeful discrimination as defined in *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979).

2. The Issue of Purposeful Discrimination Under Title IX Is Not Appropriately Raised in the Petition.

The current Petition attempts to raise again the question of whether purposeful discrimination is necessary to establish a violation of Title IX, rather than mere disparate impact. See Question 1. This was not an issue in the most recent decision of the Court of Appeals leading to the current Certiorari Petition. The issue here is properly limited to the question of amendment

[6] Orders of May 27, 1981 (App. 1b); June 22, 1981 (App. 1c); February 4, 1982 (App. 1d); March 16, 1982 (App. 1e); May 13, 1982 (App. 1f); and October 6, 1982 (App. 1g).

of complaint after affirmance of dismissal of the complaint on appeal and after the Court of Appeals has denied leave to amend.

Purposeful discrimination was the central issue in the earlier Court of Appeals decision in *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981). Petition for a Writ of Certiorari was filed from that decision on October 20, 1981, and was denied on December 14, 1981. 454 U. S. 1128 (1981). There was no petition for rehearing of that denial.

On January 11, 1982 the Court granted certiorari in *Guardians Association* v. *Civil Service Commission of New York*, 454 U. S. 1140 (1982). One of the questions presented in *Guardians* relates to the requirement of proof of discriminatory intent in an action under Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, a statute analogous to Title IX.

Petitioner apparently assumes that the granting of certiorari in *Guardians* one month after denial of certiorari in *Cannon* on a similar issue automatically revived the *Cannon* petition. The Court clearly could not have intended by granting certiorari in *Guardians* to revoke *sub silentio* the denial of certiorari in *Cannon*.

3. There Is No Conflict With *Foman* v. *Davis*

Petitioner alleges that the decision below conflicts with *Foman* v. *Davis*, 371 U. S. 178 (1962). This is simply inaccurate. *Foman* held that, "[i]n the absence of any apparent or declared reason," leave to amend a complaint should be "freely given." 371 U. S. at 182. *Foman* is inapposite for two reasons. First, unlike petitioner here, the petitioner in *Foman* moved to amend her complaint in the trial court *one day* after the court dismissed her complaint.[7]

[7] Petitioner states that she "never 'elected' to stand on her complaint rather than amend to cure the defects specified by the court

(Footnote continued on following page)

Second, this Court in *Foman* stated that there were no reasons apparent in the record to justify the trial court's decision. By way of contrast, the Court of Appeals here stated that "this case presents a number of reasons that may be relied upon for a denial of a motion to amend." (Order of February 4, 1982, Cert. Pet. App. 2d.)

The court below explained that *Foman* held, contrary to Ms. Cannon's assertion, that the reasons need not be declared so long as they are apparent on the record. The court gave examples of proper reasons for the denial of the motion to amend in this case in its orders of February 4, 1982 (App. 1d), March 16, 1982 (App. 1e), May 13, 1982 (App. 1f) and October 6, 1982 (App. 1g).

Specifically, the Court of Appeals noted that petitioner's attempt to amend was "belated." (Order of February 4, 1982, Cert. Pet. App. 2d.) Petitioner had elected to stand on her complaint and had failed to move to amend until after her appeal was denied. In its order of May 13, 1982 dismissing the appeal, the court below also noted that the trial court did not have jurisdiction to entertain petitioner's motion to amend: the Court of Appeals had already affirmed the trial court's order dismissing the complaint and had expressly denied petitioner

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(Footnote continued from preceding page)

of appeals on May 6, 1981." (Cert. Pet. 9.) In fact, this is precisely what she did. She did not move to amend in the trial court until December 22, 1981 after affirmance of the trial court's dismissal and denial of the petition for writ of certiorari in No. 81-769. Her assertion that the trial court accepted her argument that the allegation of "arbitrary and capricious" conduct was sufficient is not correct; the "arbitrary and capricious" language cited by petitioner referred only to petitioner's § 1983 claim, which had been dismissed because of insufficient state action. See decision of the court below in No. 80-1763 at Cert. Pet. App. 12a.

leave to amend after appeal in that court or in the trial court. (Cert. Pet. App. 2f.)[8]

Finally, there was an additional ground for denying leave to amend: the amendment petitioner sought would clearly have been futile because petitioner has never intended to meet the standard of purposeful discrimination as defined by this Court.

The basic theory of petitioner's claim is described in the lower court's opinion affirming the dismissal of the complaint (648 F. 2d 1104, 1105):

> Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advanced academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.

Petitioner sought to amend her complaint by simply adding allegations that the age policies of which she complained were adopted for the purpose of discriminating against women on the basis of sex.

It is clear, however, that the proposed amendments were, in petitioner's view, formal only and raised no additional

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[8] "Once an appeal has been taken from the judgment, the district court no longer has jurisdiction over the case and cannot reopen the judgment to allow an amendment to be made." Wright & Miller, Federal Practice and Procedure § 1489, at 448 (1971 ed.) *Accord, United States Fidelity & Guaranty Co.* v. *Perkins*, 388 F.2d 771, 772 (10th Cir. 1968).

evidentiary burden. In a Summary Outline of Position filed as Exhibit A to her Motion for Leave to Amend in the Court of Appeals, petitioner candidly set forth her interpretation of the meaning of her proposed amendment (at A-1):

> [P]laintiff consistently has contended that defendants applied their age policies to plaintiff with the intent—in the sense of voluntariness with an awareness of the consequences on women such as plaintiff who have interrupted education or a career in favor of motherhood—and for the purpose—in the sense of intent as aforesaid *and* the absence of any legitimate purpose sufficient to justify the discriminatory effect of such age policies on women as an incidental or unavoidable side effect—of discriminating against women.

Petitioner thus contended that, because the universities' age policies were known to have an adverse impact on women, their adoption establishes the requisite intent to discriminate.

Even assuming that respondents were aware that an age policy would have an adverse impact on women, that would not be sufficient to establish a discriminatory purpose where the policy is gender-neutral on its face. Petitioner's argument was considered and rejected by this Court in *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979). There a veterans preference statute was held not to manifest an intent to discriminate against women even though the legislature must have known that most veterans—in fact 98%—were men:[9]

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[9] Contrary to the obvious adverse impact of a veterans preference statute, such as considered in *Feeney*, here adverse impact is not apparent. The percentage of females admitted to the respondent medical schools was slightly higher than the percentage of female applicants, hardly a manifestation of an adverse impact. *See Cannon* v. *University of Chicago*, 559 F.2d 1063, 1067 (7th Cir. 1976). *See also Cannon* v. *University of Chicago*, 441 U.S. 677, 748 n. 19 (1979), dissenting opinion of Justice Powell.

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of the consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U. S. at 279

Counsel for petitioner has frankly stated there would have been nothing further to support the claim of intentional discrimination. In an interview published in *Equal Opportunity in Higher Education* (Capitol Publications), December 28, 1981, John Cannon, petitioner's husband and counsel, discussed the impact of the denial of certiorari by this Court from the decision of the Court of Appeals requiring purposeful discrimination under Title IX:

> . . . John Cannon, who represents his wife Geraldine in the six year old legal battle, said he will try to win the sex bias lawsuit against two universities by using the exact same evidence to allege intentional bias . . .
>
> Attorney Cannon said that biased motives can be inferred from the different impact that age policies have on men and women. The fact that officials could not justify the age policy on academic grounds and knew that it would affect women disproportionately proves they acted with intentional bias, he claims.

Petitioner's theory of "intentional" discrimination has already been rejected by this Court in *Feeney*. Any amendment would have merely served to protract further this already incredibly long and involved litigation.

4. The Petition Does Not Present Any Unsettled Questions of Federal Procedure

Contrary to petitioner's assertions (Cert. Pet. 10), the decision below is governed by well-established principles of federal procedure. 3 Moore's Federal Practice § 15.11 at 15-147 (2d ed. 1980):

> Where, although given an opportunity to amend, the pleader has stood upon his pleading and appealed from a judgment of dismissal, he will not normally be able to amend either in the appellate court, or in the trial court if the order of dismissal is affirmed, unless the mandate of the appellate court expressly permits such amendment.

As noted by *Moore*, "a contrary rule would, in effect, allow an interlocutory appeal." (*Id.* at 102, 1982-3 Supp.) *Accord, Cohen* v. *Illinois Institute of Technology*, 581 F. 2d 658, 662 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135 (1979).

Since the Court of Appeals expressly denied petitioner's motion to amend her complaint in that Court or for leave to present such a motion to the trial court, the trial court properly denied the motion to amend.[10]

In sum, petitioner's motions to amend were considered on six separate occasions by the Court of Appeals. The court below fully considered all of the arguments raised by petitioner here and denied petitioner's motion based upon well-established principles of federal procedure. Petitioner has failed to raise any issues justifying issuance of a writ.

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[10] Petitioner "alternatively" argues (Cert. Pet. 12) that the May 27, 1981 order was improperly issued by a single judge. However, as the Court below noted in its order of October 6, 1982, the entire court reviewed petitioner's motion to amend in deciding the Petition for Rehearing and Suggestion for Rehearing En Banc (denied on June 22, 1981; App. 1c). In addition, the decisions of the court below of February 4, 1982 (App. 1d) and of May 13, 1982 (App. 1f) were decided by three judge panels, while the decision of October 6, 1982 (App. 1g) was rendered by the full court.

CONCLUSION

For the reasons set forth herein, Respondents The University of Chicago and Northwestern University pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STUART BERNSTEIN
SUSAN S. SHER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

THOMAS H. MORSCH
WLLIAM H. THIGPEN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

ARTHUR M. SUSSMAN
The University of Chicago
Chicago, Illinois 60637
Attorneys for Respondents The University of Chicago, et al.

MARTHA P. MANDEL
Northwestern University
Evanston, Illinois 60201
Attorneys for Respondents Northwestern University, et al.

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